

## NJ's Truth-in-Consumer Contract, Warranty and Notice Act: Will Related Class Actions Against Retailers Continue?



This year brought a wave of class action complaints alleging that national retailers are violating the New Jersey Truth-in-Consumer Contract, Warranty and Notice Act (TCCWNA), N.J.S.A. §§ 56:12-14 et seq., by including certain provisions in their online terms and other consumer-facing notices and agreements. Although TCCWNA was adopted over 30 years ago, it recently has become the focus of class action plaintiffs alleging a broad interpretation of the consumer protection statute, including that statutory damages may be recovered in the absence of actual loss or injury. The filings target companies of all sizes and industries, including social media platforms that do not consider themselves traditional "retailers." Defending such claims can be an expensive proposition.

If your company does business in New Jersey, we recommend reviewing your online terms and conditions and other consumer-facing communications before the busy holiday season to minimize the likelihood that one of the neatly wrapped packages you receive is a TCCWNA demand letter or complaint.

### What Does TCCWNA Prohibit?

Enacted in 1981 as a consumer protection measure, TCCWNA prohibits sellers of products and services from including terms in any written consumer contract, warranty, notice or sign that "violate[] any clearly established legal right of a consumer" under New Jersey or federal law. TCCWNA also prohibits sellers from including language in a contract or notice that states certain provisions are unenforceable in some jurisdictions (e.g., "void where prohibited") without specifying which provisions are unenforceable in New Jersey, except in the context of a warranty.

### What Is the Potential Liability for Violating TCCWNA?

TCCWNA provides for a \$100 minimum "civil penalty" per violation, actual damages, or both, at the election of the consumer, plus attorneys' fees, costs and injunctive relief. The statute allows consumers and, perhaps, also *prospective* consumers to recover these amounts. In the recent wave of cases, some defendants have argued that a prospective or actual consumer with no injury is not "aggrieved" and thus cannot sue. In federal court, some defendants have raised standing defenses under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), which requires plaintiffs to suffer a "concrete and particularized injury" in order to have standing to sue in federal court. The courts have not yet ruled on these defendants' arguments.

## Could TCCWNA Apply to Your Company?

On its face, the statute applies to sellers, lessors, creditors and bailees of consumer goods or services. Prior to 2016, plaintiffs tended to target New Jersey-based companies, but the recent wave has included national retailers headquartered elsewhere but doing business in New Jersey. In addition, while most plaintiffs have targeted traditional retailers that have a direct sales relationship to the plaintiff class, at least one recent action claims that companies not traditionally thought of as retailers, such as online social media platforms, are also covered by the statute. The court has not yet ruled on whether this is correct.

## What Types of Disclaimers and Terms Are at Risk?

Recent complaints allege that the following types of terms, among others, violate the clearly established rights of New Jersey consumers: disclaimers of indirect, consequential and punitive damages; disclaimers of liability for negligence and intentional, malicious, willful, reckless and fraudulent conduct; disclaimers of liability for making or selling unsafe products; damage caps; and overly broad indemnification provisions. In addition, TCCWNA plaintiffs have targeted general savings clauses that state some provisions are inapplicable or void in some jurisdictions, without stating which provisions are inapplicable or void specifically in New Jersey.

Although there are court decisions from TCCWNA cases brought during the statute's first decades of existence, we do not yet have decisions in the 2016 wave of cases, so some issues are unresolved. However, companies can look to existing New Jersey case law on the enforceability of certain contractual provisions and to trends in recent complaints in order to minimize the chances that they will attract the attention of would-be plaintiffs.

## What Should Your Company Do to Minimize Risk?

Given the increase in class action complaints, companies that do business in New Jersey should review their online terms of use and other consumer-facing notices and agreements with New Jersey law in mind. Each company's circumstance is different, and there are different ways in which a company might approach TCCWNA. Consider reviewing your terms in light of the TCCWNA claims, including the following:

- Savings clauses, e.g., provisions that state that some terms may be void, unenforceable, or inapplicable in certain jurisdictions
- Disclaimers of liability for own conduct
- Disclaimers of specific types of damages, such as consequential, indirect or punitive
- Caps on damages
- Disclaimers of liability for third-party criminal conduct and data security
- Indemnity provisions that could be read to reach the conduct of non-customer third parties or the company
- Governing law/choice of law

- Dispute resolution: arbitration clause with class action waiver

As the holiday retail push gains momentum, a review of online terms is appropriate and timely. For more information about the TCCWNA-related risks your company may face, contact experienced counsel.

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